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Supreme Court, U.S.
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No. 97-386

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

POLARIS INSURANCE COMPANY, LTD., a foreign corporation,

Petitioner

AQUA-MARINE CONSTRUCTORS INC., an Oregon corporation,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in failing to apply a choice of law provision contained in a charter party agreement to which petitioner Polaris was not a party?

2. Did the Ninth Circuit err in holding that Oregon's insurance statutes require a bond before an unauthorized insurer can appear even though the claim is in admiralty?

3. Did the Ninth Circuit improperly interpret Oregon's statutory wet marine insurance exception?

LIST OF PARTIES

Respondent accepts petitioner's statement regarding the parties in this matter. Respondent has no affiliated corporations or companies.

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I. STATEMENT OF JURISDICTION

The jurisdiction of this Court is under 28 U.S.C. § 1254(1).

The statutes involved in this case are Or. Rev. Stat. § 731.006, Or. Rev. Stat. § 731.146, Or. Rev. Stat. § 731.174, Or. Rev. Stat. § 731.194, Or. Rev. Stat.§ 746.320, Or. Rev. Stat. § 746.340, and Or. Rev. Stat. § 746.360. Although petitioner also cites Or. Rev. Stat. § 731.186 and Or. Rev. Stat § 731.354, neither of these statutes were the subject of any argument before the Ninth Circuit.

II. STATEMENT OF THE CASE

Respondent Aqua-Marine Constructors, Inc. ("Aqua-Marine") entered into a charter agreement with Michael Banks under which Mr. Banks ("Banks") would bareboat charter Aqua-Marine's barge, the "Aqua 242." Part of the charter party required Banks to obtain a performance bond to secure payment of charter hire and

proper redelivery of the barge. That bond was purchased by Banks from petitioner Polaris Insurance Company, Ltd. ("Polaris"). Banks defaulted on the charter. Aqua-Marine demanded that Polaris rescue the barge and make redelivery. Polaris refused. Aqua-Marine then sued both Banks and Polaris in United States District Court for the District of Oregon. Polaris filed an answer alleging admiralty jurisdiction. Polaris was not authorized to transact business in Oregon and as such was an unauthorized insurance carrier. Oregon statutes require that unauthorized insurance carriers post a bond before appearing in any legal action. Polaris refused to post the bond as an authorized insurance carrier before filing a pleading. Because Polaris failed to post a bond required by the Oregon statute, the trial court struck Polaris's pleadings and entered judgment for Aqua-Marine.

The Ninth Circuit Court of Appeals affirmed that judgment. Polaris now seeks review in this Court, essentially based on three theories:

1. Since the charter party between Aqua-Marine and Banks contained a choice of law provision that would apply Washington law in any suit on the charter party, Aqua-Marine was bound by that language and therefore Oregon's state insurance statutes could not apply.

2. Oregon's insurance statutes requiring a bond before an unauthorized insurer can appear in any action are contrary to federal maritime law.

3. The Ninth Circuit improperly interpreted Oregon's wet marine insurance exception set forth in Or. Rev. Stat. § 731.194.

III. REASONS FOR DENYING THE WRIT

A. Summary of Argument - Choice of Law

1. This is not a suit on the charter party upon which petitioner relies for its contractual choice of law argument. Therefore, standard choice of law rules under admiralty law apply.

2. This is a suit on a performance bond which gives rise to a requirement under Oregon law for an unauthorized insurer to post a bond before filing pleadings. The Ninth Circuit Court of Appeals' reference to the underlying charter party to determine whether the performance bond was a marine contract did not transform this into a claim on the charter party or give effect to its choice of law provision.

3. Polaris is not a signer to the charter party and therefore is not entitled to rely upon its provisions, in any event.

B. Summary of Argument - Federal Preemption

1. A federal court sitting in admiralty applies state law when it does not conflict with federal maritime common law or federal statutes.

2. The Oregon statute in question does not conflict with any federal maritime common law or statute and, in fact, is consistent with federal statutory and case law.

3. The performance bond is not a contract of wet marine insurance exempted from the application of Oregon statutes.

C. Argument - Choice of Law

The charter party containing a choice of law provision was between Aqua-Marine and Banks. Polaris is not a signer to the agreement. The claims in the complaint against Polaris do not invoke the charter party or any of its terms. The suit against Polaris is on the performance bond issued by Polaris. The performance bond is a separate contract between Aqua-Marine and Polaris. It is the only contract at issue. It does not contain a choice of law provision. The choice of law provision in the charter party is inapplicable here.

The Ninth Circuit referred to the charter party only to determine whether the claim on the performance bond was a suit on a maritime contract involving admiralty jurisdiction. The Ninth Circuit found that since the

performance bond required Polaris to take action, including redelivery of the barge under the charter party, rather than simply pay money, the claim on the bond involved a marine contract subject to admiralty jurisdiction. That determination was only necessary for the court to decide which choice of law rules to apply and nothing else. The Ninth Circuit did not hold that the terms of the charter party became incorporated in, or part of, the performance bond merely because the performance bond was governed by federal admiralty law.

The Ninth Circuit's reference to the charter party did not alter the underlying claim. Aqua-Marine's claim against Polaris is on the bond, not the charter party. Any choice of law provision in the charter party is inapplicable.

Additionally, Polaris was not a signer to the charter party. Polaris's performance bond was issued as a result of

the execution of the charter party but Polaris has no rights under the charter party. A choice of law clause is a contractual right and generally may not be invoked by one who is not a party to the contract in which it appears. Paracor Finance, Inc. v. General Electric Capital Corp., 96 F.3d 1151, 1165 (9th Cir. 1995); Britton v. Co-Op Banking Group, 4 F.3d 742, 744 (9th Cir. 1993).

Aqua-Marine's claim against Polaris is not on the charter party. Polaris is not a signatory to the charter party. The choice of law provision of the charter party does not apply.

Polaris's reliance on M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), is misplaced. That case did not deal with a choice of law provision in a contract. Rather, it dealt with the

application of a forum selection clause which determined where the action could be brought, not which law applied. Polaris cites no case in support of its position that suit on a performance bond somehow invokes terms of the charter party under which the performance bond was required.

D. Argument - Federal Preemption

It was Aqua-Marine's position that the performance bond issued by Polaris was not a maritime contract. Butner v. Adams, 236 F. 105, 107 (9th Cir. 1917); Pacific Surety Co. v. Leatham & Smith Towing & Wrecking Co., 151 F. 440, 443-44 (7th Cir. 1907).

However, the Ninth Circuit found that since redelivery was required under the performance bond, the bond claim was cognizable in admiralty. Aqua-Marine Constructors v. Banks, 110 F.3d 663, 671 (9th Cir. 1997).

The court then correctly applied federal maritime choice of law rules and held that Oregon law applied because there are no contrary federal law provisions.

It is well established that disputes over marine insurance contracts are governed by state law as long as it does not conflict with federal maritime law. Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337, reh'g denied, 349 U.S. 907, 75 S. Ct. 575, 99 L. Ed. 1243 (1955). There is no direct conflict between the Oregon statute at issue and federal maritime statutory or case law.

In fact, Oregon's statute requiring a performance bond by an unauthorized insurer is consistent with the Federal Supplemental Rules for Admiralty. In admiralty actions in personam, the plaintiff may invoke remedies

provided by state law for attachment and garnishment or similar seizure of the defendant's property. Fed. R. Civ. P. Supp. R. B(1). To the extent that the Oregon statute works a prejudgment seizure on the property of an unauthorized insurer, federal maritime rules not only support such an action, they specifically provide for it.

The case law is to the same effect. In Bank of San Pedro v. Forbes Westar, Inc., 53 F.3d 273 (9th Cir. 1995), a shipowner sued its hull insurance carrier on the policy. California has a statute very similar to Oregon's, requiring an unauthorized foreign insurer to post security before filing any pleadings in a civil action. The insurer did not post such security and the Ninth Circuit ruled that it should not be permitted to file an answer.

In Toomer v. Southwest Casualty Insurance Co., 231 F. Supp. 542 (S.D. Tex. 1964), the federal trial court

addressed a similar Texas statute. The court ruled that the Texas statute neither contravened any action of Congress nor interfered with the uniform application of federal maritime law and therefore could be applied in admiralty actions. Id., 231 F. Supp. at 543.

Federal statutory and case law supports application of the Oregon statute requiring unauthorized insurers to file a bond before appearing in an action in Oregon state or federal courts. This statute is consistent with Oregon's interest in protecting its residents. Aqua-Marine is an Oregon resident and is entitled to Oregon statutory protections to the extent they do not conflict with federal maritime law. Oregon's statute does not conflict with maritime law and therefore should be enforced against Polaris.

Further, a suit on a performance bond is not a suit on a wet marine insurance contract under Oregon statutes. Polaris seeks an exemption from the statutory bond requirement by arguing that the performance bond is a contract of wet marine and transportation insurance pursuant to Or. Rev. Stat. § 746.360(1). However, the Ninth Circuit appropriately applied the doctrines of statutory interpretation and *ejusdem generis* to decide that this is not an action arising out of a policy of wet marine and transportation insurance. Rather, this is a suit on a performance bond that does not have the attributes of wet marine insurance under Oregon's statutory scheme. As such, Oregon's statutory exemption does not apply. Polaris was ordered to file a bond before appearing in this action. It did not. The Ninth Circuit correctly decided this case. Petitioner's writ should be denied.

IV. CONCLUSION

The petition is primarily based on the factually incorrect assertion that the choice of law provision set forth in charter party was incorporated into the performance bond because the bond was deemed to be a maritime contract. This is not true and there is no choice of law issue in this case.

Polaris has pointed to no conflict amongst the circuits with respect to any of the issues presented in this case. Polaris has pointed to no federal statute or common law decision that in any way conflicts with Oregon's statutory requirements for unauthorized insurers.

It was established long ago by this Court that disputes over marine contracts may be governed by state law as long as the particular law involved does not conflict

with federal maritime law. Petitioner offers no reason why the Wilburn Boat decision should be reexamined or now overruled. The holding in this case affects these litigants only and is not far-reaching in scope. Further, the decision in this case was sound and consistent with previous federal decisions on the same issues. For all of these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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